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July 30, 2004

VIA OVERNIGHT DELIVERY

Ms. Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, Massachusetts 02110

Re: D.T.E. 03-60: Proceeding by the Department of Telecommunications and Energy on its Own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers

Dear Ms. Cottrell:

Covad Communications Company, through counsel, hereby submits for filing in the above-referenced proceeding before the Massachusetts Department of Telecommunications and Energy these Comments responding to the Department's June 15, 2004 Letter Order. Enclosed please find an original and ten (10) copies of these Comments, a duplicate and a self-addressed, postage-paid envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provide.

Please feel free to contact Brett Heather Freedson at (202) 887-1211 if you have any questions regarding this filing.

Respectfully submitted,



Erin Weber Emmott (BBO# 644405)

Counsel to the Covad Communications Company

cc: Service List (via email)

**Before the
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY**

Proceeding by the Department of)
Telecommunications and Energy on its Own)
Motion to Implement the Requirements of) D.T.E. 03-60
the Federal Communications Commission's)
Triennial Review Order Regarding Switching)
for Mass Market Customers)

**COMMENTS OF
COVAD COMMUNICATIONS COMPANY**

Covad Communications Company ("Covad"), by its attorneys, respectfully submits these Comments in response to the June 15, 2004 Letter Order of the Massachusetts Department of Telecommunications and Energy (the "Department") in the above-captioned proceeding. Covad submits that Verizon is obligated under section 271 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 271, to provide to CLECs access to certain network elements and combinations of network elements. Covad submits these Comments to emphasize that Verizon's unbundling obligations under section 271 require that Verizon provide unbundled access to the high frequency portion of the loop, also known as Line Sharing.

Regardless of the expiration of the D.C. Circuit's self-imposed stay, Verizon has an affirmative obligation to continue to provide unbundled network elements, including Line Sharing, at rates consistent with the TELRIC cost methodology. Verizon's obligation stems from four factors: (1) existing interconnection agreements between competitive carriers and Verizon; (2) federal and Massachusetts law, including the existing provisions of both sections 251 and 252 of the federal Act, including section 252(e)(3), which gives states the express authority to enforce their own requirements with respect to access and interconnection with the incumbent's facilities, and section 271 of the Act; (3) the *Bell Atlantic/GTE Merger Order* in

which Verizon agreed to continue to provide all unbundled network elements and combinations thereof until all legal challenges to the FCC's unbundling rules were resolved; and (4) existing Department orders which specify the rates at which and the extent to which UNEs must be provided.

A ruling regarding Verizon's continued obligation to provide Line Sharing is appropriate in this proceeding. Verizon's illegal intentions to discontinue the provision of Line Sharing are clear. For example, Verizon's language in its Massachusetts UNE Tariff stating that **"No orders for Line Sharing will be accepted after October 1, 2004,"** clearly establishes Verizon's intent to ignore its obligation to continue providing Line Sharing pursuant to all applicable laws, including section 271 in Massachusetts. The Department, in order to prevent Verizon from taking unilateral actions in Massachusetts, should make clear now, that Verizon is obligated to continue to provide Line Sharing pursuant to section 271 of the Act.

The change of law provision contained in Covad's interconnection agreement with Verizon in Massachusetts calls for a negotiation process and Department arbitration, should negotiations fail. Moreover, Department approval is required under section 252(e) of the Act prior to allowing Verizon to unilaterally implement any such change in law. As discussed further below, Verizon continues to have additional obligations other than those under section 251, *such as section 271 referenced below*, to provide UNEs. The following is the applicable change in law provision in Covad's Interconnection Agreement with Verizon in Massachusetts:

The Parties recognize that the FCC has issued and may continue to issue the FCC Regulations implementing Sections 251, 252, and 271 and other Sections of the Act that affect certain terms contained in this Agreement. In the event that any one or more of the provisions contained herein is inconsistent with any applicable rule contained in such FCC Regulations or as may be enacted by the Commission, or imposed by a court in the exercise of its lawful jurisdiction, or which, in BA's reasonable determination, affects BA's application pursuant to Section 271(d) of the

Act, the Parties agree to negotiate in good faith the revisions necessary to eliminate the inconsistency or amend the application-affecting provisions. Such revision need not be considered material, and need not require further Commission approval beyond any Commission approval required under Section 252(e) of the Act. If, however, any such change in Applicable Law or amendment to this Agreement would necessitate a change that would affect the interconnection of network facilities or Covad's ability to use any BA service or Network Element, Covad shall have a reasonable time to modify or re-deploy its network or operations to reflect such change.

I. IN THE *TRIENNIAL REVIEW ORDER*, THE FCC WAS EXPLICIT THAT SECTION 271 SERVES AS A SEPARATE SOURCE OF INDEPENDENT AUTHORITY FOR UNBUNDLING

Even though the Federal Communications Commission (“FCC”) in the *Triennial Review Order* (“TRO”) removed Line Sharing from the list of UNEs under 251, Verizon remains under an “undisputed continuing obligation” to provide unbundled access to the high frequency portion of the loop (“HFPL”) under section 271. To begin, the FCC’s *TRO* made clear that section 271 creates independent access obligations for BOCs:

[W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.¹

Thus, based on the above language from the *TRO*, there is no question that, regardless of the FCC’s analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, Verizon, as a BOC, retains an independent

¹ *TRO* at ¶ 655.

statutory obligation under section 271 to provide competitors with unbundled access to the network elements listed in the section 271 checklist, including loop transmission.²

Moreover, the FCC in the *TRO* was clear that a network element withdrawn under a section 251 no-impairment analysis could still be part of an ILEC's wholesale obligations via section 271. According to the FCC, the unbundling requirements of the two sections were to be reconciled as follows:

In order to read the provisions [sections 251 and 271] so as to not create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251 . . . This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provisions (section 251) has eliminated.³

Thus, as evidenced by the plain language of the *TRO*, the FCC clearly contemplated that section 271 could require the unbundling of network elements that were no longer required to be unbundled under section 251. As discussed below, this statutory obligation includes providing unbundled access to loops and specifically, the HFPL.

II. AS PART OF THE BOC'S NETWORK ACCESS OBLIGATIONS, VERIZON IS REQUIRED TO PROVIDE UNBUNDLED ACCESS TO LOOPS UNDER SECTION 271 CHECKLIST ITEM 4, WHICH INCLUDES THE HFPL

By its plain language, section 271 checklist item 4 requires the BOCs to provide access to the HFPL. Section 271 checklist item 4 requires Verizon to provide access to "local loop transmission from the central office to the customer's premises, unbundled *from local switching or other services*."⁴ (emphasis added). The HFPL is clearly a form of loop transmission—a loop transmission that Verizon itself routinely uses to provide xDSL services

² See 47 U.S.C. § 271(c)(2)(B).

³ *TRO* at ¶ 659.

⁴ See 47 U.S.C. § 271(c)(2)(B)(iv).

separately from narrowband voice services.⁵ Moreover, the FCC in the *Line Sharing Order*, specified that “requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*.”⁶ In light of this clear statutory language and the FCC’s distinction for purposes of unbundled access between the high frequency loop transmission path and the narrowband portion of the loop used for the transmission of voice, there is no question that Verizon remains under a statutory obligation to offer unbundled HFPL loop transmission to competitors, notwithstanding any finding of no impairment pursuant to section 251.

Each time the FCC has reviewed a 271 application since the advent of Line Sharing, the FCC has insisted the BOC long distance applicant offer non-discriminatory access to the HFPL in order to comply with checklist item 4.⁷ To this day, even after its decision to eliminate HFPL access in the *TRO* under section 251, the FCC continues to look at the non-discriminatory availability of Line Sharing as an integral component of its checklist item 4 analysis in section 271 proceedings.⁸ The significance of this point cannot be overstated. There

⁵ In other words, Verizon customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

⁶ See *In the Matters of Deployment of Wireline Service Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147 et al. Third Report and Order, et al., FCC 99-355 at ¶ 18 (1999) (“*Line Sharing Order*”).

⁷ See, e.g., *Joint Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 at ¶¶ 214-219 (2001)

⁸ See *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin*, WC Docket No. 03-167, Memorandum Opinion and Order FCC 03-243, ¶¶ 142-145 (2003); see *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, Memorandum Opinion and Order, FCC 03-142 at ¶ 53, and App. C, ¶¶ 50-51 (2003); see *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Michigan*, WC Docket No. 03-138, Memorandum Opinion and Order, FCC 03-228 at ¶¶ 133-143 (2003). In Michigan, the FCC required SBC, the

is simply no question that the Act and the FCC require Verizon to provide non-discriminatory access to the HFPL if Verizon desires to provide interLATA long distance services.

III. SEVERAL STATE COMMISSIONS HAVE RECENTLY FOUND THAT SECTION 271 OF THE ACT REQUIRES A BOC TO PROVIDE UNBUNDLED ACCESS TO THE HFPL

Covad urges the Department, as other states have done, to formally adopt the concept that section 271 imposes a separate, independent obligation on ILECs to provide unbundled HFP. For example, by order issued on February 13, 2004 at Docket No. P-100, SUB 133k, the North Carolina Utilities Commission (“NCUC”) recently found that BellSouth Telecommunications, Inc. (“BellSouth”), as a BOC, is required to provide unbundled access to the HFPL even though the HFPL is no longer required to be unbundled under section 251 of the Act. In support its determination, the NCUC cited to Paragraph 659 of the *TRO*, which specified that “section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251 . . .” As a result, the NCUC ruled that BellSouth could not remove line sharing from the Self-Effectuating Enforcement Mechanisms (“SEEM”) Plan.

By order issued on December 16, 2003 at Docket No. 7892-U, the Georgia Public Service Commission (“GPSC”) also denied BellSouth’s request to remove Line Sharing from its SEEM Plan in Georgia. In denying BellSouth’s request, the GPSC reasoned that BellSouth must still provide access to Line Sharing pursuant to the transitional mechanism set forth in the *TRO* and pursuant to section 271 checklist item 4. In doing so, the GPSC cited to Paragraph 654 of the *TRO*, which specified that BOCs have an independent and ongoing access obligation under section 271.

BOC long distance applicant, to provide non-discriminatory access to the HFPL as a precondition to gaining long distance authority pursuant to checklist item 4 of section 271 after the *TRO* eliminated line sharing as a UNE.

More recently, the Pennsylvania Public Utility Commission (“PAPUC”), on July 8, 2004, issued an order finding that “Section 271 of the Act provides an independent source of authority by which Verizon may still be under a requirement to provide non-discriminatory access to HFPL.”⁹ Moreover, in response to Verizon’s argument that the unbundling requirement for local loop transmission of section 271 checklist item 4 does not include HFPL, the PAPUC held that “under prior line sharing rules, unbundling of the HFPL of the stand-alone cooper loop has been invariably discussed by the FCC in conjunction with that agency’s review of RBOC compliance with Checklist item #4.”¹⁰ Accordingly the PAPUC ruled that since “line sharing was a Section 271 checklist item and no present FCC decision has eliminated this from Verizon PA’s ongoing Section 271 obligations, we conclude that there is no basis for this Commission to unilaterally sanction removal of line sharing from Verizon PA’s tariff under the present state of the FCC orders.”¹¹

The Maine Public Utilities Commission (“MPUC”) also has held that Verizon must continue to provide CLECs with access to Line Sharing in order to comply with checklist item 4 of section 271.¹² In coming to this conclusion, the MPUC relied, among other things, on the FCC’s language in the *Massachusetts 271 Order*, which states:

On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting

⁹ *Covad Communications Company v. Verizon Pennsylvania Inc.*, Opinion and Order, R-00038871C0001 at 16 (July 8, 2004).

¹⁰ *Id.* at 17-18.

¹¹ *Id.* at 20.

¹² *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Examiner’s Report, Docket No. 2002-682 at 28 (July 23, 2004).

carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of Section 271.¹³

Thus, at least four state commissions have, to date, adopted the FCC's finding that a BOC has an independent statutory obligation under section 271 checklist item 4 to provide unbundled access to loop transmission. In these cases, the state commissions found that this obligation to unbundle the loop includes Line Sharing. The Department should follow these commissions' precedent and require Verizon to continue to offer Line Sharing pursuant to section 271 of the Act.

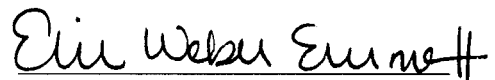
¹³ *Application of Verizon New England, Inc. et. al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order at ¶163 (Apr. 16, 2001).

IV. CONCLUSION

For the reasons stated above, Covad submits that Verizon is required under section 271 of the Act to provide unbundled access to the high frequency portion of the loop. Accordingly, the Department, under authority of the Act, should require Verizon to continue providing unbundled access to the high frequency portion of the loop consistent with federal law and the parties' Interconnection Agreement.

Respectfully submitted,

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Dated: July 30.2004